EX PARTE OR LATE FILED

HOGAN & HARTSON
L.L.P.

COLUMBIA SQUARE
555 THIRTEENTH STREET NW
WASHINGTON DC 20004-1109
(202) 637-5600

BRUSSELS
LONDON
PARIS
PRAGUE
WARSAW
BALTIMORE, MD
BETHESDA, MD
McLEAN, VA

JOEL S. WINNIK
PARTNER
DIRECT DIAL (202) 637-5857

February 13, 1995

BY HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: Clarification of the Fifth Memorandum Opinion and Order, CC Docket No. 93-253.

Dear Mr. Caton:

In the Fifth Memorandum Opinion and Order in CC Docket 93-253, ¶ 90, (released November 23, 1994) ("Fifth MO&O"), the Commission indicated that if two entities (X and Y) had formed a joint venture to bid in the A and B block auction, they would be considered to have an identity of interest and their investments in any designated entity ("DE") applicant would be aggregated for purposes of the affiliation rules. As a result, if the total investment in the DE by X and Y together exceeded 25%, then the aggregate of X's and Y's assets and revenues would be attributed to the DE. In many cases, the combined assets and revenues would exceed the Commission's financial caps for the C and F block auctions. As shown below, the Commission's apparent decision to attribute the assets and revenues of X and Y to the DE applicant in every case may have the unintended effect of eliminating some applicants that are of the very type the Commission sought to assist under the DE program. We hereby seek clarification or modification of that ruling.

If the Commission's recent ruling is applied to certain DE ventures, in which all of the investors, including the DE, also invested in an MTA applicant, the ruling, as currently articulated, may block those ventures because the DE partners also participated in the MTA applicant, thereby creating an identity of interest. The Commission's ruling would deny those DEs the opportunity to have exclusive

No. of Copies rec'd 0+1

FAX: (202) 637-5910 TELEX: 248370(RCA), 892757(WU) CABLE: HOGANDER WASHINGTON

control of a PCS licensee in which there is significant investment by other parties, simply because the other parties chose to join the DE in the MTA venture. As is demonstrated in the examples presented below, a DE should not be penalized for its ability to attract MTA partners.

Example 1

A is one of the nation's best-managed small telecommunications firms, which until recently focused almost exclusively on its local exchange business, and built on its excellent talent and reputation to organize a partnership with B and C with the goal of bidding in the MTA and DE auctions. This group of companies, led by A, undertook a PCS business plan which called for the formation of separate joint ventures to bid in both the MTA and DE auctions. The plan began with formation of an MTA applicant. The applicant is currently bidding in the MTA auction as a general partnership. 1/ The next step in the business plan is to restructure a separate partnership in order to comply with the Commission's Entrepreneurs' Block rules and to bid on C and F block licenses outside of any MTA markets won in the first auction. A qualifies as a small business designated entity and will hold 25% of the equity and 50.1% of the vote. B and C will be passive investors, each with no more than 25% of the equity, but in the aggregate holding more than 25%.

Under the Commission's November 23, 1994 ruling, which was released long after these companies developed their PCS business plan, unless favorably clarified or modified, the MTA applicant would either have to withdraw from the MTA auction or A and the other investors would not be able to participate together in the DE auction. In this case, a qualified telecommunications firm would be penalized for attracting investors to join it in the MTA as well as the DE auctions. The Commission could not have intended this result.

The Commission should clarify the ruling to indicate that it does not apply where the qualifying control group member in the DE venture was also part of the original MTA venture. In this case, the same parties will merely reorganize their interests to comply with the DE rules. Such reorganization of MTA partners

---

1/ The structure of the MTA general partnership is such that while A, B and C are all general partners, B and C, individually and wholly, do not have affirmative control because A has sufficient negative control powers to block them.

into a DE applicant does not in any way establish cause for concern under the Commission's identity of interest ruling.

Example 2

We also seek clarification of the identity of interest standard in the Fifth MO&O as it relates to relationships between A and its investors. B and C, which would be passive investors in a C or F block applicant, where A is the sole member of the control group, each hold very small interests (3.17% and .1%, respectively) in A, and B holds a seat on the Board of A. In that case, the assets and revenues of B and C should not be attributed to the applicant.

A and B are 36% and 64% partners, respectively, in a recently formed partnership which is nearing completion of construction of a regional fiber optic facility. B's investment in the fiber optic venture represents a tiny percentage of B's market capitalization and the fiber optic venture now has no revenues of its own. C is a co-investor with A in certain ventures. B's and C's co-investments with A represent only a fraction of their individual assets.

These incidental investments do not raise the concerns addressed by the Commission in the Fifth MO&O. There is no reason to assume that A, B or C would vote together or otherwise act as one person within the applicant. Indeed, because A has greater experience in telecommunications than B or C, B and C are likely to defer to A's viewpoint. In any event, A will be the sole controlling party.

Example 3

A different independent telephone company ("X") that should qualify as a woman-owned small business, could not afford to pursue the PCS business on its own. Instead, it partnered with other telephone companies to bid in the MTA auction. X currently owns only 0.2143% of the MTA applicant. X would like to form a DE applicant, backed by a telephone company ("Y") that holds 72.2175% of the MTA applicant, that would seek a C or F block license in and around X's territory outside of the MTA targeted by that MTA applicant.

X would form a DE applicant and be the sole member of the control group which would hold 50.1% of the equity and the vote. Y would hold the remaining 49.9%. The principle behind the DE rules applies perfectly to X's situation. The DE rules are intended to create an opportunity for a woman-owned

small business like X to control a PCS licensee. As in the case of many other small businesses, X cannot finance a PCS venture on its own and it is not in a position to negotiate control of a PCS business financed primarily by other investors. The Commission's DE program makes it possible for X to attract a significant financial investor like Y and still control the PCS licensee.

X also owns a small percentage (14.3%) of an entity that is a fifty-percent general partner in three RSAs. A subsidiary of Y is the other fifty-percent general partner in those RSAs. There is no reason to assume that as a DE, X will in any way abdicate control because of this relationship. Like the previous examples, Example 3 does not raise the concerns that the Commission noted in the Fifth MO&O.

The Commission should not prevent a qualified DE that invests with one or more other parties in an MTA venture from establishing a DE applicant with those other parties. 2/ Similarly, incidental co-investments should not be the basis for a finding of identity of interests so as to prohibit a DE from participating in the C and F block auctions.

Respectfully submitted,

Joel S. Winnik

Joel S. Winnik

cc: Rosalind K. Allen
Kathleen Ham

2/ In addition, if the investment is so small as to be unattributable under the FCC's rules, it should not be a basis for a finding of identity of interests so as to prohibit that investor from participating in the C and F blocks.